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Sierra Leone was ravaged by civil war for ten years, during which thousands of civilians were tortured, raped, and killed by both rebel and government forces. To punish the perpetrators of these crimes, the United Nations and the government of Sierra Leone created the Special Court for Sierra Leone ("SCSL") in 2002 to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law."[1] To date, twelve people have been indicted by the SCSL for numerous crimes listed in the Statute of the Special Court of Sierra Leone ("SCSL Statute"), a legal instrument that establishes the SCSL's jurisdiction. Of the twelve people indicted, ten were charged with rape as a crime against humanity. The crime of rape, however, is left undefined by the SCSL Statute; thus, the Court must develop a suitable definition of rape as an international crime as it hears and decides these cases.

Three international tribunals have developed definitions of rape, giving the SCSL a considerable body of precedent upon which it can rely. These tribunals developed different definitions of rape, which they believed would best promote human dignity, combat gender discrimination, and support victims and witnesses, while also providing fair trials to defendants. While the International Criminal Tribunal for Rwanda ("ICTR") broadly defined rape as an act of violence akin to torture, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Court ("ICC") narrowly defined rape in a way that mimics domestic rape laws.[2]

There are two main differences between the tribunals' definitions of rape: (1) whether the definition incorporates an implicit or explicit consent paradigm;

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1 Statute of the Special Court for Sierra Leone (2000), art 1, ¶ 1 (hereinafter SCSL Statute), available online at <http://www.sc-sl.org/scsl-statute.html> (visited Mar 4, 2005).

2 By the term "domestic" rape laws, I refer generally to the national criminal laws of countries.

and (2) whether the definition includes a detailed list of physical acts that constitute the actus reus of rape. Taking an expansive view of rape, the ICTR incorporated an implicit consent paradigm that requires a determination of whether the act occurred in "coercive circumstances." Furthermore, the ICTR defined the actus reus of rape conceptually, declining to establish a list of physical acts that constitute rape.

The ICTY and ICC took a narrow approach. Modeling their definitions on domestic rape laws, the ICTY and ICC required an affirmative showing of nonconsent to establish the commission of a rape. The ICTY and ICC also created detailed lists of physical acts that constitute rape.

The SCSL should adopt a definition of rape that best balances the competing interests of promoting human dignity, gender equality, and victims' rights, on one hand; and providing due process to defendants, on the other hand. Part I of this paper briefly describes the conflict in Sierra Leone and analyzes the relevant SCSL provisions—the Special Court's Statute and Rules of Procedure and Evidence. Part II describes the international precedent developed by the ICTR, ICTY, and ICC. Having explored the provisions and goals of the SCSL and the international precedent, Part III presents several issues the SCSL must consider when choosing a definition of rape and argues that adopting a broad definition of rape, similar to the definition set forth by the ICTR, will best serve the goals of the SCSL.

I. THE SPECIAL COURT FOR SIERRA LEONE

The context in which the SCSL was created and the Court's provisions should inform the SCSL's definition of rape. The UN and the government of Sierra Leone collaborated to create the Special Court for Sierra Leone to prosecute leaders responsible for large-scale human rights abuses, terror campaigns, and widespread rapes committed against civilians. The SCSL Statute was drafted to enable the Court to prosecute these crimes, placing special emphasis upon rape and sexual violence by criminalizing several forms of sexual violence and, through various provisions, providing support to victims and witnesses.[3]

From 1991 to 2002, Sierra Leone was torn by a civil war in which different rebel groups, government soldiers, and peacekeepers brutalized the mostly impoverished civilian population across all areas of the country, despite various

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3 Charles Cobb Jr., *Sierra Leone's Special Court: Will It Hinder or Help?,* available online at <www.allafrica.com/stories/printable/200211210289.html> (visited Mar 4, 2005).

peace accords and regime changes throughout the period.[4] Refugees had no secure places to flee to because neighboring countries were also embroiled in civil war.

The civil war was marked with brutal campaigns, such as "Operation Burn House," a series of arson attacks on civilian homes; "Operation Pay Yourself," widespread looting of civilians; and "Operation No Living Thing," one of the bloodiest campaigns in the civil war, during which combatants would "destroy, or kill anything" in their path.[5] "Sexual violence peaked during the rebels' military operations," and was used to reward soldiers after they had captured a town or village, to assert dominion over the population, and to degrade people who held allegiance to the government.[6] In "Operation No Living Thing," the Revolutionary United Front ("RUF"), the main rebel force, systematically killed, burned alive, and raped thousands of women and children within the city of Freetown.[7] In their attempt to degrade civilians, the RUF targeted young women and girls who were thought to be virgins, because after being raped and losing their virginity, their communities treated them as less eligible for marriage.[8]

Surveys conducted after the war reported that 94 percent of Sierra Leone's female-headed households experienced some form of inhumane crime during the war.[9] Of the 9 percent of females who reported war-related sexual violence, 89 percent reported rape, 37 percent reported being forced to undress or being stripped of clothing, 33 percent reported gang rape, 14 percent reported molestation, 15 percent reported sexual slavery, 9 percent reported being forced into marriage, and 4 percent reported having foreign objects forced into the

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4 For a detailed history of the war, see Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation*, 30 Denv J Intl L & Poly 325 (2002).

5 See Human Rights Watch, *Sierra Leone: Sowing Terror—Atrocities against Civilians in Sierra Leone* (July 1998), available online at <http://www.hrw.org/reports98/sierra/Sier988-03.htm> (visited Mar 4, 2005); Elizabeth Rubin, *Saving Sierra Leone, at a Price*, NY Times A27 (Feb 4, 1999).

6 Human Rights Watch, *"We'll Kill You if You Cry": Sexual Violence in the Sierra Leone Conflict* (Jan 2003) ("Sierra Leone Report"), available online at <http://hrw.org/reports/2003/sierraleone/> (visited Mar 4, 2005).

7 Id at 27, 37.

8 Id at 28 ("Although the rebel forces raped indiscriminately irrespective of age, the rebels favored girls and young women whom they believed to be virgins. This was evident not only by their actions, but was also explicitly stated by them as they chose their victims. As in many countries, Sierra Leonean society places a high value on virginity. Girls who have been "virginated and are therefore no longer virgins, are considered less eligible for marriage.").

9 Press Release, Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone, A Population-Based Assessment* (Jan 23, 2002), available online at <http://www.phrusa.org/research/sierra_leone/report_pr.html> (visited Mar 4, 2005).

genital opening or anus.[10] Of the women who reported sexual violence, 23 percent were pregnant at the time they were attacked.[11]

A solution was needed to punish those who had committed these horrific crimes and to halt the continuing violence. In 2000, the government of Sierra Leone wrote to the UN Secretary General requesting the establishment of a special court to bring rebel leaders to justice.[12] The UN and Sierra Leone's government signed an agreement establishing the SCSL in January 2002.[13] Disarmament was also completed in January 2002, officially marking the end of the war.[14]

The UN and Sierra Leone's government promptly drafted the SCSL's legal instruments,[15] granting the Court broad powers to prosecute violations that occurred during the civil war. The Court was to prosecute those who "bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law."[16] This clause limited the jurisdiction of the SCSL, leaving lesser criminals to Sierra Leone's Truth and Reconciliation Commission.[17]

The SCSL Statute empowered the SCSL to adjudicate a large number of crimes. What makes the SCSL unique, however, is that "[g]ender crimes will be emphasized as a war crime," treated as a "top priority," and "pursued from the

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10 Id.

11 Id.

12 Amnesty International, *Sierra Leone: Renewed Commitment Needed to End Impunity* (Sept 24, 2001), available online at <http://web.amnesty.org/library/index/engafr510072001> (visited Mar 4, 2005).

13 *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (Jan 16, 2002), available online at <http://www.sc-sl.org/scsl-agreement.html> (visited Mar 4, 2005).

14 *Global IDP Database: Sierra Leone: End of IDP Return?*, available online at <http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wViewSingleEnv/Sierra%20LeoneProfile+Summary> (visited Mar 4, 2005).

15 The SCSL is a unique tribunal because it was the product of collaboration between the government of Sierra Leone and the United Nations and because it receives financial support from both.

16 SCSL Statute, art 1, § 1 (cited in note 1).

17 Office of the Attorney General and Ministry of Justice, Special Court Task Force, *Relationship between the Special Court and the Truth and Reconciliation Commission* 8 (Jan 7–18, 2002), available online at <http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/TRC_SpCt.html> (visited Mar 4, 2005). The Truth and Reconciliation Commission is a "quasi-judicial institution, with powers to issue subpoenas and administer oaths and affirmations, but no power to enforce those provisions legally through trial for contempt of court, for which it must refer cases to the Sierra Leone High Court." Id at 3–4.

onset," not as an "afterthought," because "rape, and sexual assault used as a tool of war need to be prosecuted."[18]

Two articles that specifically provide for the prosecution of rape enable the SCSL to fulfill its mandate. Article 2 grants the SCSL the authority to prosecute persons who committed "[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence" and any "other inhumane acts" as "part of a widespread or systematic attack against any civilian population."[19] Article 3 grants the SCSL the power to prosecute persons who committed or ordered the perpetration of "[v]iolence to life, health and physical or mental well-being of persons," and "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."[20]

The SCSL's Rules of Procedure and Evidence, adopted from rules of the International Criminal Tribunal for Rwanda, were drafted to accommodate the special needs of rape and sexual violence victims. The Court appointed prosecutors and investigators with experience in gender-related crimes.[21] A Witness and Victim Section, staffed by trauma experts specializing in sexual violence, was created to provide "relevant support, counseling and other appropriate assistance" to victims of rape.[22] The Witness and Victim Section supports victims who might otherwise be unable to testify. Additionally, evidentiary procedures further help those who will testify by enabling the judge to "order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused."[23] For example, the judge can control the manner of questioning, conduct in camera proceedings or closed sessions, and can prevent the disclosure of witnesses' identities.[24]

The SCSL has charged ten people with crimes of sexual violence, including rape, sexual slavery and any other form of sexual violence, and other inhumane

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18 Cobb, *Sierra Leone's Special Court* (cited in note 3) (statement by Alan White, the SCSL's Chief Investigator).

19 SCSL Statute, art 2 (cited in note 1).

20 Id, art 3.

21 Id, art 15, ¶ 4.

22 Rule 34 of the Special Court's *Rules of Procedure and Evidence* implements this requirement. SCSL Rule 34(A)(iii), available online at <www.sc-sl.org/scsl-procedure.html> (visited Mar 4, 2005).

23 SCSL Rule 75(A).

24 SCSL Rule 75(B).

acts.[25] The indictments alleged that women and girls were raped, abducted and used as sex slaves, subjected to sexual violence, and forced into marriage throughout the country. The SCSL must adopt a definition of rape consistent with its priority of prosecuting gender crimes.

II. INTERNATIONAL LEGAL PRECEDENT

The SCSL has a significant body of precedent that it can rely upon when formulating its definition of rape. Three international tribunals have already defined rape as an international crime, adopting definitions of rape which they felt best balanced the rights of defendants and the rights of victims. The two major differences between these definitions are the ways in which the definitions (1) determine whether the act was consensual and (2) identify the actus reus of rape.

A. ICTR DEFINITION

The ICTR was the first international tribunal to convict a person of genocide and crimes against humanity on the basis of sexual violence.[26] In *Prosecutor v Akayesu*, the trial chamber found that Jean-Paul Akayesu, who was in charge of the Taba Commune where many displaced civilians sought refuge, knew that women were regularly raped and subjected to other forms of sexual violence.[27] Because Akayesu knew of the sexual violence and was present during their commission, the trial chamber found that he was guilty of facilitating and encouraging the violence.

In *Akayesu*, the Chamber articulated a definition of rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[28] Two elements of its definition were unprecedented and thus the definition has become quite influential. The Chamber incorporated a broad consent paradigm that focused on whether the circumstances of the alleged rape were coercive, rather than whether the victim actually consented.[29] The Chamber

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25 The indictments against Sam Bockarie and Foday Saybana Sankoh were withdrawn due to their deaths. See *Foday Sankoh*, Daily Telegraph (UK) 25 (Jul 31, 2003). The indictments are available online at <http://www.sc-sl.org/RUF.html> (visited Mar 4, 2005).

26 Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J Intl L 288, 318 (2003).

27 *Prosecutor v Akayesu*, Case No ICTR-96-4-T, ¶¶ 58–111 (Sept 2, 1998). The majority of the displaced civilians were of Tutsi ethnicity and were being terrorized and murdered by those of Hutu ethnicity.

28 Id at ¶ 598.

29 In doing so, the Court uses "coercive circumstances" as a proxy for consent, recognizing that consent is legally not possible when there are coercive circumstances that remove a victim's ability to consent.

also defined the actus reus of rape conceptually, without including a detailed list of specific acts.

The Chamber intended its definition to remain broad to adjudicate the types of acts the Tribunal prosecuted. Domestic laws that narrowly defined rape as "non-consensual intercourse"[30] did not provide suitable definitions for the ICTR because they failed fully to take into account the circumstances surrounding rapes committed during war. The Chamber recognized that the notion of victim consent has little place when soldiers use rape as a form of torture "for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person," [31] or as a means of degrading and dehumanizing women belonging to the group associated with the enemy. The coercive circumstances created by soldiers during the crisis, including threats, intimidation, extortion, and other forms of duress, vitiated the possibility of consent for victims who were placed in those circumstances.[32] By including a "coercive circumstances" paradigm in its definition of rape, the Chamber rightly removed the focus from the actions of the victim, concentrating instead on the situation created by the armed conflict.[33]

The Chamber also rejected building into its definition of rape a detailed list of physical acts, a common component of domestic definitions of rape. Including such a list was inappropriate for an international tribunal attempting to prosecute rapes that occurred in innumerable, unimaginable ways because it would unduly

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30 *Akayesu*, ICTR-96-4-T at ¶ 596 ("While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.").

31 Another international tribunal has held that rape can constitute torture. In *Aydin v Turkey*, 3 Eur Ct HR 300 at ¶ 83 (1997), the European Court of Human Rights held that the rape of a person in custody "by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim." Rape is a particularly serious form of torture because it "leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence," and because "the acute physical pain of forced penetration [must leave victims] feeling debased." Id.

32 For example, when women are being held in custody, their lives being threatened daily, they have been placed in coercive circumstances in which it is impossible for them to legally consent to sexual intercourse. The coercion present in those circumstances vitiates the possibility of legal consent, in spite of the fact that the victim may have told the rapist at gunpoint that she is willing to have intercourse with him.

33 Although the ICTR ultimately changed its definition of rape in *Prosecutor v Semanza*, Case No ICTR-97-20-T ¶¶ 344–46 (May 15, 2003), the Trial Chamber did not criticize its prior definition. Instead, the Court stated that it found a narrower definition set forth by the ICTY persuasive because it engaged in a "comparative analysis" of different national laws. Id at ¶ 345. The ICTR's repudiation of its prior definition of rape decreases some of its value as precedent. However, the definition of rape in international law is by no means settled and the ICTR's decision remains valid precedent to be adopted by the SCSL.

limit the jurisdiction of the court. The Chamber recognized, for instance, that the crime of rape could include "acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[34]

As a crime of aggression, "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."[35] To do so would result in a mechanized and insensitive prosecutorial inquiry into the precise details of the act, putting unwarranted stress on victims and witnesses who testify. Thus, the Chamber adopted a conceptual definition of rape[36] that was broad enough to maintain the flexibility it needed to prosecute a variety of crimes and to support victims and witnesses.

B. ICTY DEFINITION

Soon after the ICTR's decision in *Akayesu*, the ICTY adopted a different definition of rape that was modeled after domestic definitions of rape.[37] In *Prosecutor v Kunarac*, the Trial Chamber defined rape as the "sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim."[38] The court defined the mens rea of the crime of rape as the "intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[39]

The ICTY definition differs from the ICTR definition in that it incorporates an explicit requirement of nonconsent and includes a detailed list of acts constituting rape. The ICTY's use of a nonconsent requirement is based on the underlying assumption that consent to sexual penetration is always possible.

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34 *Akayesu*, ICTR-96-4-T at ¶ 596.

35 Id at ¶ 597. The *Akayesu* tribunal also held that forced nudity was a form of sexual violence constituting inhumane acts as crimes against humanity. Id at ¶¶ 10A, 688, 692–694.

36 Id at ¶ 687 ("The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law.").

37 *Prosecutor v Furundzija* was the first ICTY case to define rape. It based its definition on a survey of domestic laws, although it declined to adopt every element of national criminal definitions of rape in order to avoid "a mechanical importation or transposition from national law into international criminal proceedings." Case No IT-95-17/1-T, ¶ 178 (Dec 10, 1998). *Furundzija* defined rape as "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person." Id at ¶ 185.

38 *Prosecutor v Kunarac*, Case No IT-96-23-T and IT-96-23/1-T, ¶ 460 (Feb 22, 2001).

39 Id.

For sexual penetration to constitute rape, "the victim's will [must have been] overcome or . . . her ability freely to refuse the sexual acts . . . permanently negated."[40] Whether a victim consented is to be judged according to whether the victim's consent was "given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances."[41] While the ICTY must evaluate the surrounding circumstances of the act, the requirement of nonconsent also demands an inquiry into the victim's behavior to determine whether she truly did not consent.

The ICTY also incorporated consent as an affirmative defense in the ICTY Rules of Procedure and Evidence.[42] The availability of consent as an affirmative defense means that not only will the prosecutor have to prove that the victim did not consent as an element of the crime, but the defendant will have an opportunity to present a full-blown defense based on the argument that the victim consented. Consent as an affirmative defense is not available when the chamber determines that consent is legally impossible.[43] However, because the ICTY must hear consent defenses before determining whether they are allowed, consent defenses can be brought initially in every proceeding, resulting in excessive burdens placed on those who are testifying. The ICTR, by contrast, forecloses this possibility by focusing its analysis exclusively on whether the circumstances surrounding the act were coercive.

In addition to incorporating an explicit requirement of nonconsent, the ICTY also articulated a detailed list of physical acts constituting the actus reus of rape. The Chamber found that a more specific definition was necessary to ensure due process for defendants.[44]

C. ICC DEFINITION

The International Criminal Court operates under a definition of rape that is very similar to the one set forth by the ICTY. The ICC's definition is articulated

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40 Id at ¶ 452 ("The common denominator underlying these different circumstances [in which 'rape' will have occurred in national laws] is that they have the effect that the victim's will was overcome or that her ability freely to refuse the sexual acts was temporarily or more permanently negated.").

41 Id.

42 ICTY Rule 96, available online at <http://www.un.org/icty/legaldoc/procedureindex.htm> (visited Mar 4, 2005).

43 According to ICTY Rule 96, consent is legally impossible when the victim "has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression," or "reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear." Id; *Kunarac*, IT-96-23-T and IT-96-23/1-T at ¶ 462.

44 *Kunarac*, IT-96-23-T and IT-96-23/1-T at ¶ 437. The Court relied on what it called a "principle of specificity," which is a "criminal principle" of law that requires specificity when outlining elements of crimes.

in the Statute of the International Criminal Court, the ICC's Rules of Procedure and Evidence, and the ICC's Elements of Crimes,[45] which were written by representatives of UN member states.

Under the ICC Statute, rape is defined as a situation in which

> (1) [t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body, and (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[46]

The "concept of invasion" referred to in the definition is "intended to be broad enough to be gender-neutral"[47] and includes situations in which men are the victims of rape. The Statute also recognizes that "a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."[48]

The ICC's Elements, similar to the ICTY's approach, integrate consent as an affirmative defense and the Rules of Procedure and Evidence set forth detailed specifications concerning the use of a consent defense.[49] To establish a consent defense, a defendant must demonstrate that the victim had the legal capacity to consent and that coercive circumstances did not exist.[50] If the defendant can establish these two elements, the ICC will consider evidence to decide if the victim genuinely consented.[51] Consent will not "be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent."[52] Additionally, where the victim is incapable of giving genuine consent, or when a victim is silent or does not resist

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45 Kristen Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 Colum Hum Rts L Rev 625, 637–38 (2001).

46 *Elements of Crimes*, ICC Doc ICC-ASP/1/3, Art 7(1)(g)-1 (Sept 3–10, 2002).

47 Id, art 7(1)(g)-1 n15.

48 Id, art 7(1)(g)-1 n16.

49 Rule 70(a)–(c), *ICC Rules of Procedure and Evidence*, ICC Doc ICC-ASP/1/3 (Sept 3–10, 2002).

50 Id.

51 Rule 72 of the ICC Rules of Procedure and Evidence provides guidance on the types of evidence that will be admitted. It does not automatically exclude any evidence, but states that judges must decide to admit evidence based a variety of factors, including the well-being, dignity, and privacy of victims and witnesses.

52 ICC Rule 70(a).

the sexual violence, consent cannot be inferred.[53] Although the ICC has yet to hear a case,[54] it is likely that, similar to the ICTY, the ICC will always allow a defendant to put on a consent defense initially, gaining the ability to potentially retraumatize victims by asking insensitive questions and by insinuating that a victim consented.

The ICC definition, similar to that set forth by the ICTY, also sets forth a detailed list of acts that constitute rape.

III. ADOPTING A DEFINITION OF RAPE THAT REFLECTS THE REALITY OF ARMED CONFLICT

The SCSL must adopt a definition of rape that best promotes human dignity, combats gender discrimination, and provides support to victims and witnesses, while simultaneously providing due process to defendants.[55] The definition that achieves the best promotes these interests is the ICTR definition, which characterizes rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[56]

A. COERCIVE CIRCUMSTANCES VERSUS EXPLICIT NONCONSENT

The ICTR definition is preferable to the ICTY definition because it defines rape using a "coercive circumstances" paradigm. This paradigm evaluates the issue of consent by focusing on whether the circumstances surrounding the act were coercive rather than focusing on the victim's response to the rape. Such an approach takes into account the realities of how rape is used as a weapon of war and best promotes human dignity and gender equality, combats gender discrimination, and provides support to victims.

The ICTR definition recognizes that, in armed conflict, where there are mass killings and widespread torture, where citizens have no place to flee to

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53 ICC Rule 70(b), (c).

54 The ICC opened its first two investigations in June and July 2004. See ICC Press Release, *The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation* (June 23, 2004), available online at <http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html> (visited Mar 4, 2005); ICC Press Release, *Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda* (July 29, 2004), available online at <http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html> (visited Mar 4, 2005).

55 Although typically an international tribunal may also want to consider whether it is important to adopt a definition based on a survey of domestic laws, the argument set forth in this paper is that domestic laws provide insufficient guidance to an international tribunal prosecuting rape that is used as a weapon of war.

56 *Akayesu*, ICTR-96-4-T at ¶ 598.

safety, and where rape is being used as a weapon of war, sexual intercourse between a solider and a citizen can never be truly consensual. "True consent [to sexual intercourse] will not be possible"[57] because the experience of warfare, in which people are dying and being tortured, places victims in a state of complete fear, removing them from a noncoercive environment in which they can freely choose to participate.[58]

Any realistic definition of rape as a crime against humanity must be based on the underlying philosophy that, during war, individuals who are persecuted are not legally capable of consent. If, during "Operation Burn House," a RUF soldier went to a house, told the female inhabitant that he was hungry and wanted food, and the woman welcomed him inside and set all her food before him, even though her family would starve, would it be reasonable for anyone to say that she consented to feeding the soldier? No one would argue that the woman willingly gave the soldier her food—in those circumstances, the woman had *no choice* but to give the solider her food. For her, the decision was either to give her food to the solider or risk her life. Similarly, it is inappropriate to argue that the woman, when faced with the same soldier demanding intercourse instead of food, consented. In any situation in which one person has power over another and the possibility exists that death will result if the person's "request" is not obeyed, consent to the request is impossible.[59]

The ICTY and ICC definitions, on the other hand, are based on domestic rape laws, which assume that consent is always a possibility. These definitions are based on the assumption that individuals are able to make rational and informed choices concerning their best interests and that they have the opportunity to do so in a noncoercive environment.[60] To the extent that the ICTY and ICC definitions highlight the concept that individuals are able to make rational and informed choices, they reinforce the view that women and men are autonomous, with equal rights to make rational choices about their lives.

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57 *Prosecutor v Kunarac, Appeals Chamber Judgement*, Case No IT-96-23 and IT-96-23/1-A, ¶ 130 (June 12, 2002).

58 Christina M. Tchen, Comment, *Rape Reform and a Statutory Consent Defense*, 74 J Crim L & Criminol 1518, 1528 (1983).

59 This argument rests on the assumption that true consent is impossible when coercive circumstances exist such that the victim's freedom of choice is restricted.

60 See Susan Estrich, *Rape*, 95 Yale L J 1087, 1120–1132 (1986); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S Cal L Rev 777, 805–806 (1988); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brooklyn L Rev 39, 45, 79–88 (1998). See also Peter H. Schuck, *Rethinking Informed Consent*, 103 Yale L J 899, 900 (1994) (discussing the doctrine of informed consent).

Upon closer examination, however, this reinforcement is merely theoretical. In practice, this notion of consent permits defendants to retraumatize testifying victims and prevent others from testifying by asking degrading questions. By allowing defendants to verbally attack victims, insinuate that a victim consented to sex, enjoyed it, and even initiated sexual encounters, these definitions undermine a victim's psychological well-being and personal dignity. Moreover, a victim's hesitations about testifying may increase, as victims are often reluctant to talk about the abuse they suffered. Such insinuations also reinforce gender stereotypes that women enjoy rape or seduce men into raping them if they do not resist the rape.[61]

Several ICTY defendants have employed these antics, effectively violating the dignity of their victims again,[62] this time sanctioned by the court.[63] For example, Kunarac, on trial in the ICTY, argued that he did not rape a nineteen-year-old Muslim woman.[64] Instead, he argued that she made sexual advances towards him and he did not resist her. This woman was forced to initiate and perform sexual acts on Kunarac by a deputy commander who told her, "You have to please my commander."[65] During the trial, Judge Florence Ndepele Mwachande Mumba, the presiding judge from Zambia, asked the defendant, "Mr. Kunarac, are you telling us that she seduced you?"[66] He answered, "Well, no. I guess you could say that I was forced to have sex against my will."[67] Although his defense was unsuccessful and Kunarac was sentenced to twenty-eight years in jail, these antics contribute to the degradation of women and human dignity. Indeed, in the situation described, it was unnecessary for the

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61 See Susan Estrich, *Real Rape* 8–12, 15–20, 29–31, 57–63, 74, 76–78 (Harvard 1987); Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard 1998).

62 In domestic rape trials, the defendants are also able to retraumatize their victims in the same manner. However, such questioning may be justified to provide due process to defendants, because the circumstances of the intercourse might not have been coercive and there may exist a real question of whether the victim consented. Such an inquiry is not justified in an international prosecution of rape as a crime against humanity, where evidence about the coercion present in the circumstances—rather than the victim's conduct—can be presented to establish that the sexual intercourse that occurred *could not* have been consensual.

63 Defendants prosecuted under the ICTY and ICC definitions will always be able to use consent defenses as another way to harass and degrade their victims, because the court explicitly requires a showing of nonconsent and, regardless of whether or not the court ultimately accepts the defense, consent is always available to argue initially as an affirmative defense. See Parts II(B) and II(C) of this Comment.

64 *Kunarac*, IT-96-23-T and IT-96-23/1-T at ¶¶ 230–234.

65 Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 Case W Res J Intl L 305, 318 (2002).

66 Id.

67 Id.

court to inquire separately into whether the victim consented. Her ability to consent freely to sexual relations was destroyed by the surrounding circumstances—namely, that she was held in custody and forced by a deputy commander to perform sexual acts on another person.

Another defendant in the ICTY, Kovac, argued that girls he enslaved were in love with him. He supported his argument by saying that one of the girls wrote him a letter saying, "Thank you for saving me from this horrible rape house."[68] An indignant witness had to be called to refute his defense. As in the *Kunarac* case, the question of whether a victim consented to rape when she was enslaved was both insulting to the victim and legally irrelevant.

In addition to being harmful to victims, because the circumstances that "prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive,"[69] consent defenses will be almost universally incredible, and thus, ineffective. The benefits that inure to defendants when they use consent defenses are minimal, while the harms of allowing the defendants to bring such defenses are enormous.

Under the ICTR definition, in contrast to the ICTY and ICC definitions, defendants would be limited to arguing that the circumstances in which the act occurred were not coercive or, if they were superiors far removed from the fighting, that they were not responsible for creating the coercive circumstances.[70] Although ultimately this defense may not be more effective than a consent defense, because of the high likelihood that coercive circumstances existed, at minimum, defendants will not be able to use legal provisions to further degrade victims in court.

B. CONCEPTUAL DEFINITION VERSUS SPECIFIC ACTS

The SCSL should adopt the ICTR definition over the ICTY and ICC definitions because in addition to using a more appropriate "coercive circumstances" paradigm, it will allow the SCSL to function effectively as a tribunal prosecuting international crimes. The ICTR definition defines rape conceptually by using broad, gender-neutral language and declining to enumerate the various physical acts that constitute the actus reus of rape. It therefore

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68 Id.

69 *Kunarac, Appeals Chamber Judgement*, IT-96-23 and IT-96-23/1-A at ¶ 130.

70 Potential defendants are further protected by the SCSL's jurisdiction limitations, which limit the court to prosecuting those who bear the greatest responsibility for the atrocities committed upon the civilian population. Although this jurisdictional provision means that some perpetrators who are worthy of criminal prosecution will not be convicted, Sierra Leone's government has employed alternate mechanisms for dealing with those who bear lesser responsibility: they must testify before the Truth and Reconciliation Commission.

includes all forms of rape that occur in armed conflict that might otherwise be excluded by a narrower definition. Furthermore, a conceptual definition is "preferable to a mechanical definition of rape," because "the conceptual definition will better accommodate evolving norms of criminal justice."[71] A conceptual definition of rape will thus grant the SCSL the flexibility to prosecute crimes that drafters of a narrow list might not have predicted or that would not have been thought crimes at the time the list was drafted.[72]

The conceptual language in the ICTR also avoids mechanizing the inquiry into whether a person was "technically" raped[73] and recognizes that the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."[74] A holistic inquiry will help the SCSL support witnesses by allowing prosecutors and judges to be sensitive while examining witnesses.

On the other hand, the more specific definitions promulgated by the ICTY and ICC may help defendants prepare better defenses by establishing detailed elements that the prosecutor must prove: the more elements required for a showing of rape, the more points a defendant can argue. A more specific list also avoids the slippery slope problem of enabling the court to hold the defendant liable for anything it chooses.

In spite of the benefits offered by a more specific definition, the benefits to defendants do not outweigh the detriments to victims. Defendants prosecuted under the ICTR definition will be able to prepare an adequate defense by arguing that they did not commit "a physical invasion of a sexual nature . . . on a person under circumstances which are coercive." Defendants are free to argue that they did not conduct a physical invasion, only a mental or nonsexual invasion. Defendants can also argue that they did not invade the victim at all or that the circumstances in which the invasion occurred were not coercive.[75]

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71 *Prosecutor v Musema, Judgement and Sentence,* Case No ICTR-96-13-A, ¶ 228 (Jan 27, 2000).

72 For example, if a perpetrator forced a brother to rape his sister, a son to rape his mother, or a father to rape his daughter, at gunpoint and threat of death to all parties (or if he forced one person to put his penis in the mouth of the victim), he would not be found guilty of rape under *Kunarac*, even though he was the one who caused the rape. He would, however, be found guilty of rape under the *Akayesu* definition. *Kunarac*, IT-96-23-T and IT-96-23/1-T at ¶ 460; *Akayesu*, ICTR-96-4-T at ¶ 598.

73 It should be noted that the specificity in the ICTY/ICC definitions may be beneficial because it may clearly alert victims as to what kind of contact is wrong and may help victims understand when their rights have been violated. However, the definition set forth in the ICTR is not so amorphous as to trigger this problem because it defines the actus reus of rape with a degree of specificity that provides notice to both victims and defendants of when a rape has occurred.

74 *Musema*, ICTR-96-13-A at ¶ 226 (cited in note 71).

75 A full range of defenses is available to the defendant. A defendant can argue an alibi defense or attack inconsistencies in the testimony of the prosecution's witnesses, as Kunarac did in his trial.

Further, the expansive language of the ICTR definition is limited by the SCSL's mandate that it can only prosecute those who bear the greatest responsibility for the crimes committed during the war. This jurisdictional limitation minimizes the risk that the SCSL will prosecute individuals who committed non-war-related crimes during the war. Thus, the ICTR definition strikes the best balance between supporting victims and promoting human rights, and providing due process to defendants.

IV. CONCLUSION

As the SCSL prepares to try its ten defendants for rape as a crime against humanity, it must adopt a definition of rape that best suits its needs as a tribunal charged with prosecuting the worst crimes that occurred during the Sierra Leonean civil war. Adopting the ICTR's conceptual, "coercive circumstances" definition of rape will enable the SCSL to fulfill its goals. The definition provides due process to defendants, who are not in danger of unjustifiable prosecution and who will be able to prepare an adequate defense based on other elements of the crime of rape. Such a definition will also grant the Court the flexibility it needs to prosecute international crimes and will encourage witnesses and victims to testify, enabling the successful prosecution of the perpetrators of horrendous crimes.

The conceptual definition will promote human dignity and fight gender stereotypes by preventing the further traumatization and degradation of victims and deflating the myth that women enjoy and encourage rape. The SCSL should not lose this opportunity to promote these fundamental values of human rights when holding perpetrators accountable for the appalling rapes they encouraged and committed during the civil war in Sierra Leone.

Kunarac, Appeals Chamber Judgement, IT-96-23 and IT-96-23/1-A at ¶¶ 88–140, 349. A defendant can alternately argue that, although the rapes occurred, he lacked the power to stop them, as Akayesu did in his trial. *Akayesu*, ICTR-96-4-T at ¶¶ 29–43.